IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1160 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

R.L. VANKAR

Versus

COLLECTOR

Appearance:

MRS KETTY A MEHTA for Petitioner

M/S PATEL ADVOCATES for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 17/12/1999

C A V. JUDGEMENT

This is a petition under Article 227 of the Constitution of India for appropriate writ, order or direction, directing to quash and set aside the order of the learned Gujarat Civil Services Tribunal passed on October 6, 1987 in Appeal No.176 of 1987 confirming the orders of the Collector, Sabarkantha at Himatnagar, removing the petitioner from the Government service.

2. The facts of the case of the petitioner in this petition may be briefly stated as follows:

The petitioner was working as a Junior Clerk in the office of the Special Land Acquisition Officer under the control of the Collector, Sabarkantha District at Himatnagar. That he encashed a cheque dated 10.6.1981 for Rs.8,500.55 on 1.9.1981. That the amount was actually received through cheque on 1.9.1991 but the said amount was not credited in the Government account and it was also not posted in the cash book. The petitioner says that he proceeded on leave for pre-service training and he was under training from 6.11.1981 to 6.1.1982. Thereafter, on return from the pre-service training, he credited the said amount on 7.1.1092.

3. Therefore, the Special Land Acquisition Officer being the immediate superior of the petitioner, conducted preliminary inquiry on 21.8.1982. He also filed F.I.R. with the police station against the petitioner for offence under sections 409 and 477 of the Indian Penal Code. Investigation has been carried out by the Police Investigating Agency and charge-sheet was filed which was registered as Criminal Case No.36 of 1983 before the learned Chief Judicial Magistrate, Himatnagar. Trial was undertaken and at the close of the trial, the petitioner was held guilty for the aforesaid offence and instead of sentencing the petitioner for life imprisonment, the learned Chief Judicial Magistrate directed the petitioner to be released under section 4(1) and 4(3) of the Probation of Offenders Act, 1958 (hereinafter referred to as 'the Act').

4. The petitioner claims that thereafter the Collector, Sabarkantha issued notice to the petitioner on the basis of the judgment and order of the Chief Judicial Magistrate, Himatnagar referred to hereinabove, the petitioner was called upon to state why he be not dismissed from service. The petitioner submitted his reply and after considering the material on record, the Collector passed an order dated 4.4.1987 dismissing the petitioner from the service.

5. The petitioner claims that since he was released on probation under the Probation of Offenders Act, it was not a disqualification and, therefore, in view of the decision rendered in Divisional Personnel Officer v. T R Chellappan, AIR 1975 SC 2216, the said conviction could not be utilised against the petitioner for dismissing him. It is further contended that it was not a disqualification and therefore, his service should have

been saved by operation of Section 12 of the said Act. It is also contended that the punishment imposed is not in proportion to the gravity of the charge and, therefore, the impugned order of dismissal is illegal and is against the provisions of the Constitution of India. He, therefore, prayed to set aside the impugned order before the learned Gujarat Civil Services Tribunal (for short 'the Tribunal').

6. The said Tribunal registered the appeal of the petitioner as Appeal No.176 of 1987. However, after hearing the learned Advocate for the petitioner and the learned officers of the Collector, the learned Tribunal passed order dated 6.10.1987 and dismissed the appeal of the petitioner.

7. The petitioner has, therefore, preferred this petition before this Court under Article 227 of the Constitution of India.

8. It has been contended here that the petitioner was released under the provisions of the said Act and, therefore, under Section 12 of the said Act, it was not a disqualification and, therefore, the conviction could not be 'used' against the petitioner for departmental punishment.

9. The second contention is that considering the gravity of the charge levelled against the petitioner, the punishment awarded is too harsh.

10. Notice was issued to the respondent. I have heard Ms. Ketty A Mehta, learned Advocate for the petitioner and Ms. Katha Gajjar, AGP for the respondents and have perused the papers.

11. The facts are almost undisputable. The petitioner collected the amount of Rs.8500 and odd on 1.9.1981 and had not credited the same with the Government account. It was also not posted in the Government books of accounts and the amount remained with him for substantially a long time right upto 6.1.1982. There is no doubt about the said fact.

12. It will also be an admitted position that the petitioner was prosecuted in Criminal Case No.36 of 1983 for offence under sections 407 and 477 of the I.P.C. and he was found guilty for the said offence. There is no

dispute with regard to the said fact.

13. It is also an admitted position that instead of sentencing the petitioner to jail imprisonment, the learned Magistrate was pleased to extend the benefit of the said Act and therefore, he was released accordingly under Section 4(1) and 4(3) of the said Act. There is no dispute about the same.

14. Thereafter, the petitioner was served with charge-sheet and show cause notice and after hearing the petitioner the impugned order was passed. There is no dispute on the said fact also.

15. The only contention that has been advanced on behalf of the petitioner by Ms. Ketty Mehta is that the petitioner was extended benefit of the said Act and under Section 12 of the said Act, and the said conviction would not be treated as disqualification and, therefore, the petitioner could not have been dealt with directly on the basis of the said judgment by the Disciplinary Authority and therefore, the impugned order is bad to that extent.

16. For this purpose it would be necessary for us to refer the provisions contained in Section 12 of the said Act. Section 12 of the said Act may be referred to hereinbelow for ready reference:

> "12. Removal of disqualification attaching to conviction - Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law."

17. The above section makes it clear that when a person is found guilty of any offence and dealt with under the provisions under Section 3 of 4 of the said Act, then it shall not suffer disqualification, if any, attaching to a conviction of an offence under such law. This means that the conviction itself will not act as disqualification as envisaged under Section 12 of the Act.

18. Now this question of disqualification has been considered in good number of matters. We can refer to a decision rendered by the three Hon'ble Judges of the Hon'ble Apex Court in Divisional Personnel Officer v. T R Chellappan (supra). The Apex Court has found that there is a clear immunity in Section 12 of the said Act,

and therefore, that Section was interpreted accordingly by the Hon'ble Judges of the Apex Court in the said matter.

19. However, in a subsequent decision in Shankardas v. Union of India, AIR 1985 SC 772, three Hon'ble Judges of the Apex Court had a different interpretation of Section 12 of the said Act. It would be relevant to refer to the observations made in para 4 of the said judgment. It says that the order of dismissal from service consequent upon a conviction is not a "disqualification" within the meaning of Section 12. So there is a clear difference in the interpretation in the earlier decision rendered in AIR 1975 SC 2216 (supra).

20. Ms. Ketty Mehta appearing for the petitioner has vehemently contended that the earlier decision of AIR 1975 SC 2216 rendered by three Hon'ble Judges of the Apex Court and the subsequent decision of AIR 1985 SC 772 which has also been delivered by the Hon'ble Apex Court consisting of a Bench of three Hon'ble Judges and it is also her argument that the second decision has no reference to the first decision. There are two decisions of equal number of Judges and, therefore, it may not be desirable for a Single Judge of this Court to decide as to which principle is required to be accepted. Therefore, she submitted, if it is found proper and necessary the matter may be referred to a Division Bench.

21. Now this is not a case in which a principle has been enunciated by Three Judges of this Court differing from the earlier decision of equal number of Judges of this Court. Therefore, I do not think any useful purpose will be served by referring the matter to a larger Bench. Moreover, I am of the view that even otherwise also it is not necessary or proper to refer the issue to a larger Bench.

22. At the same time it would also be worthwhile to consider that when the above situation arises and when it is noticed that three Hon'ble Judges have decided a point in one way in 1975 and same number of Hon'ble Judges have decided a point in another way in 1985 then as per the law of interpretation, the second decision prevail over the first even if the second decision does not refer to the earlier decision.

23. It would be worthwhile to refer to a decision rendered by this Court in P R Mehta v. P H Patel 1995 (2) 473. There it has been laid down that a later special

law will prevail over the earlier special law and a later special law will prevail over the previous special law.

24. I am of the view that the principles enunciated in the above decision can mutatis mutandis be applied to the facts and circumstances of the present case and, therefore, I am of the view that the second decision rendered by three Judges of the Apex Court in 1985 will be required to be accepted in preference to the decision of the Hon'ble three Judges of the Apex Court in 1975. Therefore, I am of the view that the second decision of 1985 reported in AIR 1985 SC 772 (supra) will hold ground and the principles enunciated therein will have to be treated as law of the land.

25. In Trikharam v. V K Sheth AIR 1988 SC 282, the Hon'ble Apex Court has observed that once the benefit under the provisions of the said Act has been extended to a public person, dismissal of offender from service by Disciplinary Authority would not be permissible in view of Section 12, as it will operate as disqualification for future employment with the Government.

26. It is well settled that there are three types of punishments - dismissal, removal and termination. A dismissal from service would ordinarily stand as disqualification in getting fresh Government employment. A punishment of removal will not be treated as a disqualification for getting a future Government. Therefore, that aspect appears to have been considered in the above decision. Therefore, the said principles have been enunciated in the AIR 1988 SC 285.

27. In any case, the said decision does not say again that no punishment can be awarded on the strength of the conviction since the benefit of probation has been extended.

28. I have also come across a recent decision of AIR 1998 SC 788. There also it has been clearly laid down that section 12 of the Act would apply only in respect of disqualification that goes with a conviction under the law which provides for the offence and its punishment. That is the plain meaning of the words "disqualification, if any, attaching to a conviction offence under such law". Where the law provides for offence and its punishment also stipulates disqualification, a person convicted of the offence but released on probation, does not, by reason of section 12, suffer disqualification. It cannot be held that by reason of section 12, a

conviction for an offence should not be taken into account for the purpose of departmental punishment.

29. The facts of this case were very eloquent. The appellant was convicted for offence under section 408 of the IPC and was awarded sentence to jail imprisonment. The matter was carried in Sessions Court and the Sessions Court upheld the conviction but benefit of Section 4 of the said Act was granted. Then by reason of the said conviction, the respondent in the said matter dismissed the appellant from Government service. The dismissal was challenged by the appellant and ultimately the Hon'ble Apex Court found the said conviction resulting in grant of benefit of Section 4 of the said Act can be used for dismissing an employee from the service.

30. Looking to the aforesaid decisions, I am of the view that the conviction resulting in extension of benefit of section 4 of the said Act can be used for the purpose of considering punishment departmentally. It is, therefore not possible for me to accept the argument on behalf of the petitioner that the petitioner could not be departmentally punished straightaway on the basis of conviction, when benefit of probation was extended to the petitioner.

31. I am again of the view that the fact of conviction could be utilised for the purpose of departmental punishment and the departmental punishment awarded in the matter is therefore, not contrary to law. Therefore, this submission and arguments are not acceptable to me.

32. Another argument advanced on behalf of the petitioner by Ms Ketty Mehta is that the punishment should be in proportion to the gravity of charges levelled against the petitioner, that this is not considered and the punishment awarded is too harsh.

33. It can be seen that this is a matter of criminal misappropriation of Government money of Rs.8,500/- and odd. The money remained with the petitioner for a long time and there is no reasonable explanation from him for not depositing the same with the Government account and the amount has also not been credited in the Government books of account. So on the one hand there was criminal misappropriation and criminal breach of trust and on the other hand, falsification of books inasmuch as the said entry was not made in the books of accounts. In view of the matter, the offence was very serious and, therefore,

no leniency could be shown to the petitioner.

34. It is required to be considered that so far as the said Act is concerned, the benefit thereof, in fact, could not have been extended to the petitioner. Section 4 of the said Act very clearly says that when any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case, it is expedient that the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence, the Court may direct and in the meantime to keep peace and be of good behaviour.

35. Therefore, the requirement of Section 4 is that the offence involved should not be one punishable with imprisonment for life.

36. Admittedly, the offence under which the petitioner was punished was one under Section 409 of the IPC and consequently, the benefit of probation could not be legally extended to the petitioner in view of Section 4 of the Act.

37. In Jugal Kishore Prasad v. State of Bihar, AIR 1972, the Hon'ble Apex Court has very clearly dealt with an offence punishable under Section 326 of the Indian Penal Code providing punishment for imprisonment for life and held that the benefit of probation under section 4 of the said Act cannot be extended to a convict of the said offence.

38. A similar view has been taken in 1980 Gujarat Criminal Law Reporter (Gujarat) 462. There also the offence was punishable under Section 409 of the IPC and this Court had clearly laid down that benefit of probation could not be extended in an offence under Section 409 of IPC which is punishable for imprisonment of life.

39. Any way, this Court is not sitting as a Court of Appeal over the judgment of Chief Judicial Magistrate and therefore, there is no question of deciding the quantum of punishment awarded by the learned Chief Judicial Magistrate in the case before him.

40. Any way, I considered this aspect with a view to show that the departmental punishment inflicted on the

petitioner, cannot be said to be very harsh considering the magnitude and gravity of the charge levelled against him. It has to be considered that the petitioner has committed offence punishable for imprisonment for life and, therefore, the departmental punishment awarded cannot be said to be very harsh.

41. This Court, while exercising powers under Article 226 or 227 of the Constitution of India, would be slow in interfering with the decision recorded at the departmental level. Moreover, the petitioner had one more chance in Appeal No.176/83. The said remedy was also exhausted by the petitioner. The learned Tribunal did not find it to be a fit case for the intervention in the decision of the disciplinary authority. The tribunal had also considered the decision rendered in 10 GLR 107 for considering the quantum of punishment awarded departmentally to the petitioner. Rule 14 of the Gujarat Civil Service (Discipline and Appeal) Rules, 1971 clearly enables and empowers the disciplinary authority to punish a delinquent departmentally on the ground of his conduct which has lead to his conviction on a criminal charge. This power has been exercised in this case and hence also no illegality can be said to have been committed by the respondent. The impugned order can therefore not be held to be illegal, unauthorised and without jurisdiction.

42. So on the one hand the department had properly considered the pros and cons of the subject matter. Even the department has considered the quantum of punishment awarded to the petitioner. In that view of the matter, no interference is required at this level. In other words, the petition is without any merits and it requires to be dismissed.

43. The petition is, therefore, ordered to be dismissed. However, in light of the facts and circumstances of the case and particularly the fact that the petitioner has lost the job, the parties are left to bear their own costs in this petition. Rule is discharged.

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msp.